Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

vs.

FRED DOYLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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IN THE

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No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

vs.

FRED DOYLE,

Respondent.

BRIEF OF PETITIONER

This is an appeal from a decision of the United States Court of Appeals, Sixth Circuit, affirming the decision of the United States District Court, Southern District of Ohio, reinstating the Respondent and awarding him compensatory damages.

OPINION OF THE COURT BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in the Appendix at pp. 17-30. The decision and opinion of the United States District Court for the Southern District of Ohio, Western Division, is reprinted in the Appendix, beginning at p. 34. Neither opinion has been reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1975. The jurisdiction of this Court is evoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

FEDERAL STATUTES INVOLVED

28 U.S.C., Section 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932, Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

42 U.S.C., Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

PROVISIONS OF THE OHIO CONSTITUTION INVOLVED

Article 1, Section 7 .....Add. p. 1a
Section 16 .....Add. p. 1a

Article 6, Section 2 .....Add. p. 1a
Section 3 .....Add. p. 2a

PROVISIONS OF THE OHIO STATUTES INVOLVED

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Section 3301.07, Ohio Revised Code .....Add. p. 3a
Section 3313.17, Ohio Revised Code .....Add. p. 6a
Section 3313.20, Ohio Revised Code .....Add. p. 6a
Section 3313.203, Ohio Revised Code .....Add. p. 7a
Section 3313.47, Ohio Revised Code .....Add. p. 8a
Section 3319.11, Ohio Revised Code .....Add. p. 8a
Section 5705.02, Ohio Revised Code .....Add. p. 10a
Section 5705.03, Ohio Revised Code .....Add. p. 11a
Section 5705.192, Ohio Revised Code .....Add. p. 11a
Section 5705.194, Ohio Revised Code .....Add. p. 13a

QUESTIONS PRESENTED

1. Whether a Board of Education can be forced to give a continuing contract to a non-tenured teacher it considers too immature for the position, if one of the many factors on which the Board's decision is based is a telephone call to a local radio station, such call allegedly being within the First Amendment rights of the teacher?

2. Whether the District Court has jurisdiction over this suit since the Mt. Healthy Board of Education is not a "person" within the meaning of 42 U.S.C. § 1983 and the plaintiff could not properly contemplate $10,000 as the amount in controversy for a suit under 28 U.S.C. § 1331?

3. Whether the Mt. Healthy City School District Board of Education is immune from suit under the sovereign immunity protection of the Eleventh Amendment of the United States Constitution?

STATEMENT OF THE CASE

This case originated in a suit filed by Fred Doyle, Respondent, against the Mt. Healthy Board of Education, its members individually, and the Superintendent, for reinstatement, compensatory and punitive damages under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Doyle alleged that his limited teaching contract was not renewed in retaliation for the exercise of his constitutionally protected First Amendment rights; in particular he cited a telephone call to a local radio station criticizing the faculty dress code. Petitioners responded that Doyle's contract was not renewed as the result of a routine annual review of his performance as a teacher and not in retaliation for the exercise of his constitutionally protected rights.

The District Court ordered the Board to reinstate Doyle and to grant him a continuing contract. The Court awarded $5,158.00 in back pay and an additional $6,343.16 in attorneys' fees. The Court further rendered judgment in favor of the individual Board members and the superintendent. Costs were to be assessed against the Board. The Court stated that the Board was faced with a situation "in which there did in fact exist reason independent of any First Amendment rights or exercise thereof, to not extend tenure." (A. 27-28) (Citation omitted.) Nevertheless, the Court concluded that one impermissible reason – the telephone call to the radio station – played a substantial part in Doyle's nonrenewal.

The Board appealed to the Court of Appeals for the Sixth Circuit and that Court affirmed the reinstatement and the compensatory damages but vacated the award of attorney fees.

STATEMENT OF FACTS

Fred Doyle was employed as a teacher by the Mt. Healthy Board of Education under a series of limited contracts beginning in 1966. In accordance with section 3319.11 of the Ohio Revised Code, Doyle was notified prior to April 30, 1971, of the Board's decision not to reemploy him (Jt. Ex. 4, A. 287, R. 4).

The Board was under no contractual or statutory duty to offer him a contract for 1971-72. However, had the Board decided to rehire Doyle, Section 3319.11, Revised Code, would have compelled them to grant him a continuing contract. In response to a request by Doyle, the Superintendent advised him by letter that the following reasons for his non-renewal had been submitted to the Board:

> "1) You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.
>
> A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people.[1] This raised much concern not only within this community, but also in neighboring communities.
>
> B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present." (Jt. Ex. 7, A. 287, R. 4)

In the transcript, the individual board members stated that they also considered other evidence, Mrs. Haupt recalled the "Hinkle" incident when, as the result of an altercation between Mr. Doyle and Mr. Hinkle, another teacher, the teachers staged a protest which required all the high school students to be dismissed at noon (A. 177);[2] the spaghetti incident (Def. Ex. 1, A. 292-293, R. 529) when Doyle insisted on a second portion of food and insulted the kitchen staff (A. 188); and an occasion when Mrs. Haupt believed Doyle had lied (A. 193); as well as the WSAI incident (A. 298) and the gesture incident (Def. Ex. 5, A. 297, R. 537) when Doyle gave students he was reprimanding a two-fingered sign signifying "bull ——" (A. 195). Mrs. Haupt summarized her decision as not wanting to retain "for the rest of his teaching life" a teacher who did not demonstrate "the maturity . . . expected of a 29-year old . . . ." (A. 196).

Mr. Morris similarly testified that he was aware of the WSAI incident (A. 211-212) and the gesture incident (A. 267), but he stated repeatedly his concern about Doyle's failure to improve his maturity despite admonitions to do so. (A. 203, 212, 213, 267) Mrs. Clark was also concerned about the way Doyle handled a fight in the snack bar (A. 232, 236, 239). She explicitly stated in response to a question that the WSAI call alone did not justify the nonrenewal (A. 237). Mr. Lippmeier stated that, although he was aware of the Hinkle incident and the obscene gesture (A. 221), his decision was based on his knowledge of Doyle's immaturity (A. 224-225, 268). Mr. Lippmeier further testified about a situation in which Doyle promised all his students an automatic "A" if they would work on a pancake supper and of an occasion when Doyle permitted students to make posters in his class in support of a suspended teacher (A. 229). He concluded that the reason for the non-renewal was not simply the W.S.A.I. call (A. 229). The Superintendent also related an incident in which Doyle referred to some students as "SOB's" (A. 253).

The record, thus, amply demonstrates that the reasons for the non-renewal covered a range of situations in which the Board found Mr. Doyle's conduct unsatisfactory.

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[1] A copy of the Memorandum to Teachers is attached at pp 294-296 of the Appendix.

[2] Mr. Hinkle apparently slapped Mr. Doyle who refused to accept his apology. Both teachers were suspended until they could settle their differences. At that point the rest of the faculty gathered in the auditorium and the buses had to be called to take the students home.

The evidence also established that the Mt. Healthy Board of Education reviewed the performance of every teacher in the district before offering contracts in the spring of each year (A. 183, 207, 219, 268). At the same time that the decision was made not to rehire Mr. Doyle, nine other teachers were also notified that they would not receive a new contract for the 1971-72 school year. (Jt. Ex. 1, A. 273-274, R. 3). Four besides Doyle taught at the High School and one of those (Diane Holmes) had received a higher performance rating than had Doyle. Of all eighty-eight teachers at the High School that year, only twenty-five were rated as low or lower than Doyle. Of those, four, including Doyle, were not renewed, four had tenure and ten were not eligible for continuing contracts. The others taught in special fields, improved that year, or were characterized as cooperative and receptive. (A. 96-102, Jt. Ex. 3, A. 280-286, R. 3). In reviewing the evidence Judge Hogan of the District Court concluded that, when reaching their decision on Doyle,

> "both the Board and the Superintendent were faced with a situation in which there did exist in fact reason independent of any First Amendment rights or exercise thereof, to not extend tenure. . . . As we see it and find it as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal consequences, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith." (A. 27-28)

Yet, having dismissed the individuals, he decided against the Board.

SUMMARY OF ARGUMENT

1. The Board's decision to not offer Doyle a continuing contract was not because of his call to a local radio station.

The Board notified Doyle of its decision to not renew his contract pursuant to Section 3319.11, Ohio Revised Code. No reasons were required and none were given. On Doyle's request, the Superintendent wrote that the Board had considered the radio call in reaching its decision. The Board members, however, testified that they had acted on the basis of Doyle's immaturity and lack of tact. The District Court dismissed them. Even under *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), it is not clear that the call would be protected and *Pickering* does not hold that one impermissible reason contaminates an otherwise proper decision. The District Court erred in ordering reinstatement in this case.

2. The Court does not have jurisdiction.

The case against the Mt. Healthy Board of Education should be dismissed for lack of jurisdiction because the board is not a "person" under 42 U.S.C. § 1983. The rationale of *Monroe* v. *Pape*, 365 U.S. 167 (1961), applies to school boards which even more than municipal corporations operate as the administrative arm of the state. Furthermore, in this case, the individual members were dismissed for failure to state a cause. Absent the conduct of the individual members, there are no grounds to find the board liable.

Jurisdiction under 28 U.S.C. § 1331 should not attach because the plaintiff never had a good faith claim that could under any circumstances amount to $10,000.

3. The Mt. Healthy Board of Education is immune from suit.

The Eleventh Amendment, as interpreted by *Hans* v. *Louisiana*, 134 U.S. 1 (1890), bars suit by a citizen against an

unconsenting state. Ohio has not consented to suit under 42 U.S.C. § 1983. Education is the primary responsibility of the state in Ohio. The local boards have only those powers expressly delegated by the General Assembly. The General Assembly sets policy, including the procedures for not renewing non-tenured teachers. Since the Mt. Healthy Board of Education is merely the administrative arm of the State of Ohio, and since the Board in this case was acting pursuant to state law, and since the board members were dismissed individually, and since immunity has not been waived, the protection of sovereign immunity should be recognized in this case. Even under 28 U.S.C. § 1331, we have found no cases that award money damages against a state.

THE ARGUMENT

1. THE COURT BELOW ERRED IN CONCLUDING THAT THE BOARD REFUSED TO REINSTATE DOYLE FOR A CONSTITUTIONALLY IMPERMISSIBLE REASON.

a. The Board was not compelled to give any reasons for its decision to not renew Doyle's limited contract. In including the telephone call to the radio station as an illustration of Doyle's lack of tact, the Superintendent did not violate the teacher's First Amendment rights.

Fred Doyle had a limited contract with the Mt. Healthy Board. Section 3319.11, Ohio Revised Code, sets out the procedures for employment of teachers on a limited contract; should the board choose not to renew a limited contract, it is not required to give reasons for that decision. In *De Long* v. *Board of Educ.*, 37 Ohio App. 2d 69, 306 N.E.2d 774, *aff'd* 36 Ohio St. 2d 62 (1973) the court upheld a refusal of a school board to rehire a teacher without giving any reasons at all. Similarly, *Orr* v. *Trinter*, 29 Ohio Misc. 149, 444 F.2d 128 (1971), reversing 29 Ohio Misc. 62, 318 F.

Supp. 1041 (1970), held that a public school teacher who has not attained tenure status and whose contract of employment is not renewed does not have a constitutionl right to be told the reason for the non-renewal, nor to a hearing. See also *Conque* v. *Gausche*, 5th Cir. 3/14/75, *cert. denied* 10/14/75; *Board of Trustees of University of Tennessee* v. *Soni*, 513 F.2d 347 (6th Cir. 1975), *petition for cert. filed* 7/29/75; *Cusumano* v. *Ratchford*, 507 F.2d 980 (8th Cir. 1975); *Jeffries* v. *Turkey Run Consolidated School Dist.*, 492 F.2d 1 (7th Cir. 1974).

It is not disputed that the Board could have not renewed Doyle's contract without giving any reason. In fact, in its official communication, the Board did just that (Jt. Ex. 4, A. 287, R. 4). Doyle's claim, however, stems from a letter written at his request by the Superintendent. In that letter the Superintendent gave one reason for the non-renewal:

> "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."

The Superintendent offered two illustrations of Doyle's lack of tact: an obscene gesture he made to students and the phone call. The letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent, not the Board, wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact. When the Board members were questioned individually as to the reasons for their decision they mentioned several incidents in which they thought Doyle had failed to show an ability to handle his responsibilities including an incident arising out of an altercation with a faculty member which resulted in the school having to be closed at noon, a problem occurring when Doyle confronted the cafeteria staff demanding a larger portion of spaghetti, a time when Doyle referred to some trouble-making boys as "sons of bitches," and his management of a cafeteria fighting incident, as well as the obscene gesture and phone call.

The constitutional test for the violation of a teacher's First Amendment rights was developed in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), where the court considered the dismissal of a teacher who sent a letter to a local newspaper critical of the manner in which the Board had handled a bond issue. In holding in favor of the teacher, the Court noted the need to balance the First Amendment claims of the teacher against the need for orderly school administration. 391 U.S. at 568.

Pickering identified five factors to consider in analyzing the balance between the two: (1) the impact of the statements on the day to day operation of the school; (2) interference with the teacher's performance of daily duties; (3) the impact on relations with superiors and co-workers; (4) the public impact of the statements; and (5) the subject matter of the statement. Under these tests it should be noted that the WSAI phone call adversely affected public opinion of the school system (A. 86, 109, 199, 237); had a negative effect on Doyle's relationship with his principal (A. 89); and was more in the nature of a personal grievance than a matter of public concern. Furthermore, some of the other incidents – primarily the Hinkle episode – sufficiently disrupted the operation of the school program as to be clearly beyond constitutional protection as outlined by *Pickering*.

Applying the *Pickering* test an Indiana court in *Knarr* v. *Board of School Trustees of Griffith, Indiana*, 317 F.Supp. 832 (1970), *aff'd* 452 F.2d 649 (7th Cir. 1972), refused to order reinstatement of a teacher dismissed in part because of insubordination. One example of the teacher's improper behavior occurred when he was requested to discuss the school dress code and enlist student support. Instead he advised his class that they could defeat the adminitration by violating the code en masse because the school could not send everyone home. Other reasons included his disparaging comments about school administrators and other personnel. Plaintiff had alleged he was not given tenure because of his union activities but the court did not sustain such a finding.

The district court noted the broad discretion entrusted to the Board especially when considering whether to offer tenure and concluded in 317 F.Supp. at 836:

> "In denying Plaintiff tenure the school administrators were not acting with a desire to deprive Plaintiff of his freedoms of speech and association. The First Amendment freedoms of a teacher are not necessarily affected by the right of the school board to retain only those teachers who adequately discharge their teaching responsibilities and do not disrupt the efficient operation of the school. To the extent that this is a restriction of the freedom of a teacher, it is only incidental to the exercise of the school board's duty to maintain good schools."

Similarly, in *Parker* v. *Board of Educ. of Prince George County, Md.*, 237 F.Supp. 222, 229 (D.C. Md. 1965), *aff'd* 348 F.2d 464, *cert. denied* 382 U.S. 1030, *reh. den.* 383 U.S. 939, the court noted that the First Amendment rights of a teacher are not absolute:

> "Where the abandonment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist." *American Communications Ass'n, CIO* v. *Douds*, 339 U.S. 382 (1950).

The state legislature has given the Mt. Healthy Board broad discretion to hire faculty. The Mt. Healthy Board members repeatedly testified that their decision was based on several incidents which conveyed to them the fact that Doyle had failed to demonstrate the maturity necessary to make a good teacher. In coming to that decision the Board acted within the lawful limits of its discretion. Doyle's behavior had disrupted the good operations of the school. Under *Pickering*, the Board is entitled to judgment in its favor.

b. Even the presence of one constitutionally impermissible factor does not necessarily invalidate a school board's employment decision.

Although the Sixth Circuit Court of Appeals presumed that a non-renewal is constitutionally impermissible even if the teacher's exercise of First Amendment rights was only partially a factor in the non-renewal, no prior court has ordered reinstatement unless the constitutionally impermissible reason played a substantial part in the non-renewal. If other valid grounds exist, the decision should be affirmed. *Gieringer* v. *Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973); *Lusk* v. *Estes,* 361 F.Supp. 653 (N.D. Tex. 1973). In the following cases, the courts upheld the Board's action despite the teacher's claim: *Gray* v. *Union County Intermediate Educ. Dist.,* 520 F.2d 803 (9th Cir. 1975), *Sinair* v. *Board of Educ.* 473 F.2d 988 (2d Cir. 1973); *Cook County Teachers Union, Local 1600 A.F.T.* v. *Boyd,* 456 F.2d 882 (7th Cir. 1971), cert. denied 409 U.S. 848, reh. denied 414 U.S. 883 (1973); *Fluker* v. *Alabama State Board of Educ.,* 441 F.2d 201 (5th Cir. 1971), and *Morgan* v. *Sylvester,* 125 F.Supp. 380 (S.D. N.Y. 1954), aff'd 220 F.2d 758, cert. denied, 350 U.S. 867 (1955).

Skehan v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974), and *Roth* v. *Board of Regents,* 310 F.Supp. 972 (Wis. 1970), aff'd 446 F.2d 806 (7th Cir. 1971), rev. and rem. on other grounds, 408 U.S. 564 (1972), include dicta that a decision to not renew will be set aside if partially premised on impermissible reasons, but neither court holds that one impermissible reason contaminates an otherwise proper decision since the decisions were on other grounds. In *Skehan,* the court remanded the case to determine inter alia whether the facts supported the teacher's claim (501 F.2d at 45), and in *Roth* the issue of whether the teacher was fired even in part for constitutionally protected activity was never decided because the court relied instead on the procedural due process point. (310 F.Supp. at 983).

Danse v. *Bates,* 369 F.Supp. 139 (N.D. Ky. 1973), clarifies the issue. There, three principals and three teachers all engaged in the same activity. The board demoted the three principals and one of the teachers *solely* in retaliation for the constitutionally protected conduct (369 F.Supp. at 148). The court ordered them reinstated. Yet the other two teachers, who were not offered contracts at the same time, were not reinstated because the court found other reasons unrelated to the First Amendment conduct justified those decisions.

This case exemplifies the test suggested by a commentator[3] who warned that if any impermissible reason is allowed to bar dismissal, a teacher might participate in unpopular conduct just to insure employment.

> "It is conceivable that a teacher might openly engage in activities which, although controversial, are constitutionally protected, and thereby make it difficult for a school board to even attempt to terminate his employment despite the presence of unquestionably valid grounds for non-renewal. This is expecially (sic) true in situations where school officials would be unable to candidly deny that the teacher's 'extra-curricular activities' played no part in the decision to deny employment. Therefore it seems imperative that the improper motivation be the primary cause of non-renewal before judicial relief is granted."

In *Callahan* v. *Superintendent of Educ. of Leske County, Miss.,* 505 F.2d 83, 513 F.2d 51 (5th Cir. 1975), cert. denied 11/4/75, the Court upheld the non-renewal of a non-tenured superintendent whose employment was terminated because of community opposition, even though some of the opposition was racially motivated by the superintendent's efforts to comply with desegregation orders. The record in the instant case as in *Callahan,* supplies ample acceptable reasons to warrant

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3 "Refusal to Rehire a Nontenured Teacher for a Constitutionally Impermissible Reason." 1970 Wis. L. Rev. 162, 169.

the Board's non-renewal decision; that decision should be upheld.

2. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF THIS MATTER.

a. A board of education is not a "person" under 42 U.S.C. § 1983 subject to money damages.

Section 1983 of Title 42 of the United States Code was originally enacted as part of the Civil Rights Act of 1871 which was passed to enforce the provisions of the Fourteenth Amendment of the Constitution at a time when authorities in some states were unwilling or unable to protect the rights of the recently freed slaves and those who sympathized with them.[4] The effect of the Act was to prohibit states from passing legislation restricting the rights and privileges of its citizens,[5] to provide a federal remedy where state law was inadequate,[6] and more importantly to grant federal jurisdiction when the state courts, although sufficient in theory, were not adequate in practice.[7] The remedy provided under section 1983 of the act runs against those officials who use their authority to deny citizens their civil rights. The pertinent language reads:

[4] Cong Globe, 42 Cong, 1st Sess, p. 244.

[5] Id., App. 268.

[6] Kentucky law for example did not recognize the testimony of a black man against a white man; however, were the suit brought in federal court, federal rules, which permitted the testimony, applied. Id. p. 345.

[7] Id., p. 374. Senator Beatty of Ohio described the need for the bill as follows:

> ". . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of law to these persons." Id., at 428.

> ". . . every person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries."

The act was construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961), to apply to city policemen but not to the municipal corporation itself. Justice Douglas, writing for the majority,[8] noted that when the bill was in the Senate, Senator Sherman proposed an amendment which would have made "the inhabitants of the county, city or parish" liable "to pay full compensation" to persons injured by the acts of their officials.[9] Although passed by the Senate,[10] the House rejected the

[8] See the discussion at 365 U.S. 188-190.

[9] Cong Globe, 42 Cong, 1st Sess, p. 663. The proposed amendment read:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, by any persons riotously and tumultuously assembled together, or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any person riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred on him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition and servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

[10] Id., at 704-705.

amendment,[11] and it was eventually dropped in conference.[12]

The objection to the Sherman amendment was that civil liability would paralyze local government by creating the potentiality of a lien against the city and hence impairing its credit.[13] Opponents further objected that the municipality could be found liable even though it had no knowledge of the misdeeds of its officials.[14] Finally, opponents argued that the federal government had no authority to impose duties or liabilities on counties and towns which are subdivisions of the states.[15]

The holding of *Monroe* v. *Pape*, has been extended to school districts, for school districts, even more than municipalities, are the administrative arm of the state. The following cases have all held that boards are not "persons" under 42 U.S.C. § 1983: *Singleton* v. *Vance County Board of Educ.*, 501 F.2d 429 (4th Cir. 1975); *Sterzing* v. *Fort Bend Independent School Dist.*, 496 F.2d 92 (5th Cir., 1974); *Huntley* v. *N.C. State Board of Educ.*, 493 F.2d 1016 (4th Cir., 1974); *Strickland* v. *Inlow*, 485 F.2d 186 (8th Cir., 1973), rev'd on other grounds sub nom. *Wood* v. *Strickland*, 420 U.S. 308, rehearing denied 95 S.Ct. 1589 (1975); *Harkless* v. *Sweeny Independent School Dist.*, 388 F.Supp. 738 (S.D. Tex., 1975); *Patton* v. *Conrad Area School Dist.*, 388 F.Supp. 410 (Del., 1975); *Brown* v. *Board of Educ., City of Chicago*, 386 F.Supp. 110 (D.C. Ill., 1974); *Howell* v. *Winn Parish School Board*, 377 F.Supp. 816 (D.C. La., 1974); *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio, 1973), aff'd sub nom. *Goss* v. *Williams*, 413 U.S. 565 (1975); *Pelisek* v. *Trevor State Graded School Dist. No. 7, Salem, Wis.*, 371 F.Supp. 1064 (E.D. Wis., 1974); *Vanderzanden* v. *Trowell School Dist. No. 71*, 369 F.Supp. 67 (Ore., 1974); and *Bichrest* v. *School Dist. of Philadelphia*, 346 F. Supp. 249 (E.D. Pa., 1972). Contra, *Keckeisen* v. *Independent School Dist. 612*, 509 F.2d 1062 (8th Cir., 1975); *Aurora Educ. Ass'n* v. *Board of Educ., Aurora Public School Dist.*, 490 F.2d 431 (7th Cir., 1973), cert. denied 416 U.S. 985 (1974).

[11] Id., at 725, 800-810.

[12] Id., at 805.

[13] Cong Globe, 42d Cong, 1st Sess, 762.

[14] Id., at 788.

[15] Id., at 794.

The extension is consistent with the rationale of *Monroe* v. *Pape* and the arguments advanced in Congress in opposition to the Sherman amendment. School officials are still personally liable, but the federal court does not have jurisdiction over the board under 42 U.S.C. § 1983. *Wood* v. *Strickland*, 420 U.S. 308, reh. denied 95 S.Ct. 1589 (1975). In the present case, the District Court dismissed the individual board members for failure to establish a cause of action against them. The Board as an entity should be dismissed as well.

Courtney v. *School Dist. No. 1, Lincoln County, Wyo.*, 371 F.Supp. 401, 403 (Wyo., 1974) and *Porcelli* v. *Titus*, 302 F. Supp. 726, 730 (N.J., 1969) held that the application of section 1983 should be decided on the basis of the particular state law. The Ohio case – *Lopez* v. *Williams*, supra – determined that "the board of education was a political subdivision of the state and was therefore not a 'person' within the meaning of the Federal Civil Rights Statute, 42 USC § 1983." Accord: *Kramer* v. *Scioto Daily School Dist.*, (U.S. D.C., S.D. Ohio, E.D.) Case No. 72-406, decision March 7, 1974; *Gilliam* v. *Lewis, et al.*, (U.S. D.C., S.D. Ohio, E.D.), Case No. C2-73-287, decision, March 26, 1974. This reasoning is consistent with Ohio law discussed below in connection with sovereign immunity.

Occasionally courts have distinguished under 42 USC § 1983 between plaintiffs who ask for injunctive or other equitable relief and those seeking money damages. Money damages run against the district's treasury and therefore are barred by *Monroe* v. *Pape*, 365 U.S. 167, 187-192 (1961). In *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), the court extended *Monroe* to equitable damages. The Court reasoned

that nothing in the act suggests that Congress intended the word "person" to have a different meaning depending on the nature of the relief sought. Municipalities were beyond the scope of section 1983 in either event.

Monroe and *Kenosha* are compatible with *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1938), a case involving the First Amendment rights of labor organizers. In *Hague*, Justice Roberts discussed the history of the Civil Rights Act of 1871 and its relationship to federal question jurisdiction which requires a statutory amount in controversy. The doctrine of *Hague* limits actions under the Civil Rights Act to those brought against individuals in which the "right assessed is inherently incapable of pecuniary valuation" as opposed to property rights. 307 U.S. at 531. Under *Hague* actions for compensatory damages involving property rights must be brought under federal question jurisdiction, 28 U.S.C. § 1331. See also *Kochhar* v. *Auburn University*, 304 F.Supp. 565 (M.D. Ala., E.D. 1969).

In the present suit, Doyle sued for reinstatement, compensatory and punitive damages. While some courts consider back pay as part of the equitable relief of reinstatement,[16] *City of Kenosha*, supra, would deny back pay regardless of what it is called. This policy is consistent with the Eleventh Amendment protection of state funds[17] and with the reasoning of *Monroe*. As Congressman Farnsworth argued in the original Civil Rights Act debates in 1871, to permit monetary recovery against a political subdivision on a cause of action created by Congress would "put the hand of the national government into [the local government's] treasury." Cong. Globe, 42d Cong, 762.

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[16] See, for example, *Board of Trustees of Ark A & M* v. *Davis*, 396 F.2d 730 (8th Cir. 1968) which granted jurisdiction under 42 U.S.C. § 1983 but denied the claim of back pay because of a sovereign immunity defense. See also *Monell* v. *Dept. of Social Services of City of N.Y.*, 394 F.Supp. 853 (1975).

[17] *Edelman* v. *Jordon*, 415 U.S. 651 (1974) discussed *infra*.

Since section 1983 of the Civil Rights Act does not apply to the Mt. Healthy School District because it is not a "person," the Court has no jurisdiction under to 28 U.S.C. §§ 1343 (3) and (4), for they merely support the section 1983 claim. *Harkless* v. *Sweeney Independent School Dist.*, 388 F.Supp. 738 (Tex. 1975).

b. Doyle has never had a claim that could be valued at $10,000 and therefore cannot bring the suit under 28 U.S.C. § 1331.

In analysing the application of *City of Kenosha* to the claims of teachers against school boards, one commentator[18] concluded that boards could not be held liable under 42 U.S.C. § 1983.

> "The effect, if not the purpose of the Courts ruling in the *City of Kenosha* case, is to put a minimum $10,000.00 amount in controversy requirement on civil rights actions brought in the federal district courts against municipal bodies. Henceforth, a dismissed or non-renewed school teacher who asserts a constitutional claim for damages against a defendant public school district, its trustees or superintendent in their representative capacities, must plead and establish the $10,000.00 jurisdictional amount under 28 U.S.C. § 1331."

Similarly the Second Circuit in *Brandt* v. *Town of Milton*, 43 L.W. 2388 (2/14/75) noted the relationship between 28 U.S.C. § 1331 and 42 U.S.C. § 1983 and concluded that section 1331 "preserves the municipality's immunity as to actions not involving the minimum sum." Consequently close scrutiny of the amount in controversy is required before § 1331 jurisdiction attaches.

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[18] D. Griffis & J. Wilson, Constl. Rts. and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract, 25 Baylor L. Rev. 539, 581 (1973).

Section 1331 of Title 28 of the United States Code grants federal jurisdiction over civil actions "whenever the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States." Consequently Doyle is entitled to jurisdiction under § 1331 provided he can establish a substantial federal question and $10,000 in controversy. He claimed a violation of his First Amendment rights and requested reinstatement and $50,000 in damages, court costs and attorney's fees. Yet the record indicates that at no time under any circumstances did Doyle have a legitimate claim of $10,000.

Civil rights claims are capable of monetary evaluation under section 1331. *Giles* v. *Harris*, 189 U.S. 475 (1903); *Spock* v. *David*, 502 F.2d 953 (3rd Cir., 1974), cert. granted 95 S. Ct. 1556 (1975); *Brown* v. *Board of Education of City of Chicago*, 386 F. Supp. 110 (D.C. Ill., 1974). However unless the plaintiff determines his pecuniary interest in the right, jurisdiction does not attach. Thus in *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir., 1970), cert. denied 400 U.S. 960 (1970), the Sixth Circuit denied jurisdiction when the plaintiff alleged that he did not know the precise dollar value of his right to distribute leaflets on a military reservation. See also *Coleman* v. *Tennessee Valley Trades and Labor Council*, 396 F.Supp. 671 (D.C. Tenn., 1975). Doyle has made no effort to place a value on his right to call a radio station about the faculty dress code beyond his claim for compensatory and punitive damages. The First Amendment claim per se does not grant jurisdiction under 28 U.S.C. § 1331.

Section 1331 specifically excludes interest and costs in computing the amount in controversy. Under *Alyeska* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court analyzed attorneys' fees to costs and refused to award them absent statutory authority. On the basis of *Alyeska*, the Sixth Circuit in the present case denied attorneys' fees. In *Sincock* v. *Obaro*, 320 F.Supp. 1098 (D. Del., 1973) and *Cupples Co. Mfg.* v. *Farmers and Merchants State Bank*, 380 F.2d 184 (5th Cir., 1968),

jurisdiction was refused for failure to have a sufficient amount in controversy after attorneys' fees were excluded. Attorneys' fees cannot form the basis for jurisdiction in the present suit.

The District Court in this case refused to award punitive damages. While punitive damages are included in determining the amount in controversy provided they are claimed in good faith, *Bell* v. *Preferred Life Assurance Society*, 320 U.S. 238 (1943), they may be ignored if merely made to establish jurisdiction. *Smith* v. *Greenhow*, 109 U.S. 669 (1884). Doyle did not have a $10,000.00 claim without the punitive damages. The refusal of the Supreme Court to grant monetary rewards against political bodies in *Monroe* v. *Pape*, 365 U.S. 167 (1961) and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) suggests that they would be inappropriate here. Jurisdiction in this case should not be premised on punitive damages.

The value of Doyle's claim to reinstatement was never as much as $10,000. Doyle held a non-tenured contract which expired in August, 1971. Although he was eligible for a tenured contract at the discretion of the school board, he was not entitled to it by state law, and no value can be assigned to something he held no legal interest in. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

At the time Doyle filed the suit, July 13, 1971, he – according to his own testimony (A. 172) – had already found other employment with the Miami Trace Local School District. While the general rule for determining the amount in controversy when the right to office is at issue is the amount of salary, *Columbian Ins. Co.* v. *Wheelright*, 20 U.S. 534 (1822), this rule need not apply when a teacher has secured other employment. See *Kochhar* v. *Auburn University*, 304 F.Supp. 565 (M.D. Ab. E.D., 1969). The most Doyle could anticipate in damages when he filed his suit was the difference between his anticipated salary at Mt. Healthy and his actual wages at Miami Trace. This amount was calculated by the

District Court to be a total of $5,158.00 for the *three years* it took the case to come to judgment.[19] *Ross* v. *Prentiss*, 44 U.S. (3 How.) 771 (1945), however, holds that the claim may not be aggregated over the years:

> The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but in the amount in dispute between them.

At no time could Doyle in good faith claim as much as $10,000.00 in compensatory damages. In sum jurisdiction cannot be brought under 28 U.S.C. § 1331.

3. THE MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION IS IMMUNE FROM SUIT UNDER THE SOVEREIGN IMMUNITY PROTECTION OF THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. The Mt. Healthy Board of Education is a governmental entity entitled to Eleventh Amendment immunity from money damages.

1. The Eleventh Amendment

The Eleventh Amendment of the United States Constitution provides that no state is subject to suit by a citizen of another state. The amendment was passed in response to *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), which had held that states could be sued under the Judiciary Clause of the Constitution. Two days after *Chisholm* was announced a resolution was introduced in the Senate proposing a constitutional amend-

[19] Counsel for the Mt. Healthy Board of Education calculates the difference between what Doyle would have earned at Mt. Healthy and what he would earn at Miami Trace during the three years at only $501.33! The compensation figures are reprinted in the Appendix, at pp. 288, 290. (Jt. Ex. 5, 8, R. 4, 312.)

ment to overturn the ruling. Five years later that resolution became the Eleventh Amendment.

The doctrine of sovereign immunity embodied in the amendment has been extended to encompass suits by foreign powers against a state. *Monaco* v. *Mississippi*, 293 U.S. 313 (1934), by corporations against a state, *Smith* v. *Reeves*, 178 U.S. 446 (1900); in admiralty, *Ex Parte State of N.Y.*, 256 U.S. 490 (1921); by one state against another, *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); and by citizens of the state against the state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890). Accord: *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); see also *Williams* v. *U.S.*, 289 U.S. 553, 574-577 (1933).

The majority in *Hans* explained the policy when it concluded at page 21.

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of the state represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended by greater evils than such failure can cause.

The doctrine of sovereign immunity has been sharply criticized by many;[20] it has been eroded by the concept of implied

[20] The arguments that state sovereignty is incompatible with natural justice and our federal system of government were advanced by the

waiver under certain circumstances when a state participates in federal programs.[21] Nevertheless the doctrine has been upheld and should be applied in the present case.

To permit suit here under 28 U.S.C. § 1343(3) or (4) would require construing the Civil Rights Act to create a cause of action against the state despite the explicit legislative rejection of that possibility which was confirmed by *Monroe* v. *Pape*, 365 U.S. 167, 188-190 (1961).

2. Ohio Law

The doctrine of sovereign immunity is recognized in Article 1, Section 16, of the Constitution of Ohio which reads:

> Suits may be brought against the State, in such courts and in such manner, as may be provided by law.

The provision is not self-executing; absent statutory waiver the State may not be sued. *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959). The protection of sovereign immunity is shared under Ohio decisions by counties, *Schaeffer* v. *Board of Trustees*, 171 Ohio St. 228,

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majority in *Chisholm* v. *Georgia*, 2 Dall. 419 (1973), and rejected by the passage of the Eleventh Amendment. See also *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973) (Brennan, J. dissenting); *Larson* v. *Domestic and Foreign Corp.*, 337 U.S., 708-709 (1948) (Frankfurter, J., dissenting); *Krause* v. *State*, 31 OhioSt2d 132, 149, 285 N.E.2d 736, 746 (1972) (Brown, J. dissenting).

[21] *In Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the court held the state liable in tort on the basis of an interstate contract under the Compact Clause of the Constitution (Article I, Section 10) and the Jones Act, 46 U.S.C. § 688. In *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964), the state was held liable under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq., when suit was brought by employees of a state owned railroad. In *Edelman* v. *Jordon*, 415 U.S. at 651, 672 (1974), which held a state not liable for retroactive payments to welfare recepients, *Petty* and *Parden* were distinguished because in F.E.L.A. and the Jones Act, Congress specifically designated states as potential defendants.

168 N.E.2d 547 (1960); state hospitals, *Mossman* v. *Donahey*, 46 Ohio St.2d 1, — N.E.2d — (1976); and state universities, *Thacker* v. *Board of Trustees, Ohio State University*, 35 Ohio St.2d 49, 298 N.E.2d 542 (1973); *Wolf* v. *Ohio State University Hospital*, supra; as well as by school districts, *Baird* v. *Hosmer*, 46 Ohio St. 2d 273 (5/26/76); *Board of Education* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905).

The test developed in Ohio to determine whether an entity is entitled to sovereign immunity for tort actions was stated in *Board of Commissioners of Hamilton County* v. *Mighels*, 7 Ohio St. 109 (1857). There the Court distinguished between municipalities, which might be liable, from counties which were not:

> ". . . municipal corporations are called into existence, either at the direct solicitation or by the free consent of the people who compose them.
>
> Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority.
>
> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, . . ."

School districts, created by the State, to perform state functions fall within the latter category.

The Ohio Supreme Court considered the question of sovereign immunity under the Eleventh Amendment as recently as April, 1976, and concluded that a state hospital could not be sued under federal law without the consent of the state. *Mossman* v. *Donahey*, 46 Ohio St. 2d 1, — N.E.2d — (1976). While the doctrine is not favored when it has an

arbitrary effect, Ohio courts have consistently stated that if Ohio law is to be changed, it must be changed by the legislature. See e.g. *Wolf* v. *Ohio State University Hospital,* 170 Ohio St. 49, 53, 162 N.E.2d 475 (1959).

3. Federal Courts Apply State Law

The question as to whether a state agency, such as a local board of education, is entitled to sovereign immunity in federal court is decided by the federal courts within the context of state law. *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718, 720 (Del. 1974). In Ohio, education is primarily the responsibility of the state. Ohio Constitution, Article 1, § 7 and Article 6. The General Assembly is charged with raising money to secure 'a thorough and efficient system of common schools throughout the State", and with organizing a public school system supported by state funds. Ohio Constitution, Article 6, Sections 2 and 3.

Local boards have only the powers delegated to them by the General Assembly. These powers include the corporate powers "of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property." Section 3313.17, Ohio Revised Code. Local boards also have authority to make rules and regulations for their own government, control their employees, students, and others on school grounds (Revised Code, Section 3313.20), and to manage and control the public schools in the district. (Revised Code, Section 3313.47).

At the same time the local district is subject to the general supervision of the state board which is responsible for forming policy and evaluation, administering the allocation and distribution of state and federal funds, and prescribing minimum standards for local elementary and secondary schools. Section 3301.07, Revised Code. Furthermore the General

Assembly has set out the procedure for hiring and terminating teachers and for granting tenure. Section 3319.11. When the Mt. Healthy Board made the decision challenged in this suit it was acting under this statute.

Public schools in Ohio are financed by local, state and federal funds. The local board is authorized to receive its share, along with the city and county, of unvoted taxes under the ten-mill limitation of sections 5705.02 and 5705.03, Revised Code; and to raise additional funds for authorized purposes through tax levies submitted to and approved by the electorate. Sections 5705.192 and 5705.194, Revised Code.

Ohio law does not authorize expenditures by school districts for money judgments in tort suits. A board of education has only such powers as the legislature has seen fit to confer upon it. *State ex rel. Locker* v. *Menning,* 95 Ohio St. 97, 115 N.E. 571 (1916); *State ex rel.* v. *Pierce,* 96 Ohio St. 44, 117 N.E. 6 (1917); *Schwing* v. *McClure,* 120 Ohio St. 335, 166 N.E. 230 (1929). As stated in *Board of Educ.* v. *Best,* 52 Ohio St. 138, 152 (1894):

> The authority of boards of education like that of municipal councils, is strictly limited. They both have only such powers as is expressly granted or clearly implied, and doubtful claims as to mode of exercising the powers vested in them are resolved against them.

Title 33, Ohio Revised Code, deals with the education laws of the state and Chapter 3313, Revised Code, applies specifically to boards of education; but neither contains any specific authorization for an expenditure to pay a tort liability judgment. Nor is there authority that such power may be implied.

The Ohio legislative scheme assumes that the board of education is immune from money damages. Section 3313.-203 of the Ohio Revised Code provides that boards may purchase insurance for the individual members of the board

of education "against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity . . ." Similar authority is NOT granted to protect the School District Board of Education as a corporate entity.

The legislative assumption is supported by Ohio case law. Courts have repeatedly held school boards not liable in tort actions. *Baird* v. *Hosmer,* 46 Ohio St. 2d 273 (5/26/76); *Hall* v. *Board of Educ.,* 32 Ohio App. 2d 297 (1972); *Shaw* v. *Board of Educ.,* 17 Ohio Law Abs. 588 (1934); *Board of Educ.* v. *Volk,* 72 Ohio St. 469, 74 N.E. 646 (1905). The rationale for immunity in these cases is that the local board is not authorized to raise taxes or sell property to pay a tort claim, *Volk,* supra at 480.

This limitation is consistent with the Federal law which recognizes the pocketbook test in restricting liability. See *Edelman* v. *Jordon,* 415 U.S. 651 (1974); *Jordon* v. *Gilligan,* 500 F.2d 701 (6th Cir., 1974); *Skehan* v. *Board of Trustees, Bloomsburg State College,* 501 F.2d 31 (3rd Cir., 1974); *Frye* v. *Lukehard,* 364 F.Supp. 1379 (W.D. Va. 1973) and *Sincock* v. *Obaro,* 320 F.Supp. 1098 (Del. 1970). See also *Thonen* v. *Jenkins,* 517 F.2d 3 (4th Cir., 1975). When jurisdictions have permitted money damages against boards of education, the court has found that the school authority had the power and resources to pay the judgment. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718 (1974), the court found that the University could raise the funds without further action by the state legislature, 381 F.Supp. at 721; and in *Fabrizio & Martin, Inc.* v. *Board of Educ. of Central School Dist. No. 2,* 290 F.Supp. 945 (N.Y. 1968), state law specifically authorized the school district to pay judgments against the school district by levying taxes. 290 F.Supp. at 948.

The only school cases in tort that we have found in Ohio where immunity has not been a bar to suit have involved equitable relief *when the public treasury is not directly at*

issue. *State ex rel. Board of Educ.* v. *Gibson,* 130 Ohio St. 318 (1935), involved the issue of whether the plaintiff board was immune from the statute of limitations and therefore in a position to collect tuition from non-residents even though the six year limitation had lapsed. *Akron Board of Educ.* v. *State Board of Educ.,* 490 F.2d 1285, (6th Cir.) cert. denied 417 U.S. 932 (1974), was to restrain the transfer of land to an adjoining district. *Wayman* v. *Board of Educ.,* 5 Ohio St. 2d 248, 215 N.E.2d 394 (1966), dealt with whether a Board could be ordered to stop maintaining a nuisance (a parking lot).

The facts in the present case do not argue for changing Ohio law. The board members as individuals were exonerated. The board as an entity acted pursuant to its statutory responsibility to notify Doyle, a non-tenured teacher, that his contract would not be renewed. The sovereign immunity defense should be recognized in this case.

b. The Board's immunity has not been waived.

The Ohio Constitution recognizes sovereign immunity for the state unless it is expressly waived. Article 1, Section 16. *State ex rel. Williams* v. *Glander,* 148 Ohio St. 188, 74 N.E.2d 82 (1947); *Palumbo* v. *Industrial Commission,* 140 Ohio St. 54, 42 N.E.2d 82 (1947); *Raudabaugh* v. *State,* 96 Ohio St. 513, 118 N.E. 102 (1917). The state legislature has not waived immunity for school boards. Sections 2743.01-2743.20, Revised Code, which waive state immunity and create a special court of claims for suits against the state, specifically exclude school districts from those governmental agencies to which the waiver applies.

Section 3313.17 of the Revised Code describes the powers of boards of education which include the capacity of "suing and being sued." The statute, however, has been construed narrowly; boards have not been held liable in tort claims.

Shaw v. *Board of Education*, 17 Ohio Law Abs. 588 (1934); *Hall* v. *Board of Educ.*, 32 Ohio App. 2d 297 (1972); *Board of Education* v. *Volk*, supra.

Brown v. *Board of Educ.*, 20 Ohio St. 2d 68, 253 N.E.2d 767 (1968) construed Section 3313.17 of the Revised Code to permit suit in a state court only in conjunction with other powers conferred by statute. Since school boards have specific powers to acquire real property, the board in *Brown* could be sued for adverse possession, but *Brown* does not extend section 3313.17 to authorize suit for a tort. 20 Ohio St. 2d 68, 72-73 (1969). See also *Wayman* v. *Board of Education*, 248 Ohio St. 248 (1966). Similarly in *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959), the court refused to construe a grant of power to sue and be sued as a waiver of the immunity secured by Article 1, Section 16, of the Ohio Constitution.[22]

Doyle's claim is grounded in tort law for he seeks redress for an alleged infringement on his constitutional rights. Doyle can not bring the suit for breach of contract because he was non-tenured and his two year limited contract expired. He had no right to a continuing contract under state law.

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[22] In the following states, courts have construed a general power to sue or be sued to *not* affect the tort immunity of school districts: *Tuck* v. *County Board of Educ.*, 22 Ala. 177, 131 So 436 (1930); *Tapscott* v. *Page*, 17 Alaska 507 (1958); *Wallace* v. *Laurel County Board of Educ.*, 287 Ky. 454, 153 S.W.2d 915 (1941); *Weddle* v. *Board of County School Com'rs.*, 94 Md. 334, 51 A. 289 (1902); *Daniels* v. *Board of Educ.*, 191 Mich. 339, 158 N.W. 23 (1916) *Todd* v. *University of Missouri*, 347 Mo. 460, 147, S.W.2d 1063 (1941); *Perkins* v. *Trask*, 95 Mont. 1, 23 P.2d 982 (1933); *Anderson* v. *Board of Educ.*, 49 N.D. 181, 190 N.W. 807 (1922); *Consolidated School Dist.* v. *Wright*, 128 Okla. 193, 261 P. 953 (1927); *Antin* v. *Union High School Dist.*, 130 OR 461, 280 P. 644 (1929); *Shubert* v. *School Dist.*, 169 S.C. 191, 168 S.E. 391 (1933); *Morris* v. *University of Texas*, 348 S.W.2d 644, (Tex. 1961), rev'd on other grounds 163 Tex. 130, 352 S.W.2d 947, *cert. denied* 371 U.S. 953, *Krutili* v. *Board of Educ.*, 99 W.Va. 466, 129 S.E. 486 (1925); *Holzworth* v. *State*, 238 Wis. 63, 298 N.W. 168 (1941).

Finally it should be noted that courts have repeatedly held that neither the Fourteenth Amendment, Title 28 of the United States Code, nor the Civil Rights Act constitutes an effective waiver of sovereign immunity. See *Corbean* v. *Xenia City Board of Educ.*, 366 F.2d 480 (6th Cir., 1966); *Cuiska* v. *City of Mansfield*, 250 F.2d 700 (6th Cir., 1957); *Thatcher* v. *Board of Trustees of Ohio State University*, 58 Ohio Op. 45, 277 N.E.2d 818 (1971); *St. Louis University* v. *Blue Cross Hospital Service Inc.*, 393 F.Supp. 367 (D.C. Mo. 1975).

THE CONCLUSION

The relationship between a board of education and a teacher is essentially a matter of state concern and state law. *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (Burger, C. J. concurring at 603). Federal jurisdiction should not attach to such situations unless there is clear violation of the teacher's constitutional rights. Since the record here indicates that the Board's decision was not in retaliation for Doyle's exercise of a First Amendment right, the Board's decision should be affirmed.

Furthermore, the Sixth Circuit erred in awarding back pay and reinstatement against the Board. The Mt. Healthy Board of Education is immune from suit under Ohio law and the Eleventh Amendment. Since the General Assembly has not waived that immunity, the Board cannot be sued under 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4). Doyle never had a good faith claim of $10,000 to bring suit under 28 U.S.C. § 1331.

To hold the Board liable for not renewing Doyle's contract when no wrongdoing is attributable to the individual members is nonsense for the Board can only act through its members. The Board is entrusted with the duty to operate an efficient and effective school system, which includes the responsibility of developing a strong faculty. If this Court compels the

Mt. Healthy Board of Education to retain Doyle for the rest of his teaching life because its original decision, although proper, was contaminated by an alleged infringement of First Amendment rights, then the capacity of local school districts to educate the district's youth will be severely restricted.

Respectfully submitted,

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ADDENDUM

ARTICLE I: CONSTITUTION OF OHIO

§ 7 [Rights of conscience; education; necessity of religion and knowledge.]

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const 1802, Art VIII, §§ 3, 25.)

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

ARTICLE VI: EDUCATION

§ 2 School funds.

The general assembly shall make such provisions, by tax-

ation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

§ 3 Public school system; boards of education.

Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts. (Adopted September 3, 1912.)

STATUTES

OHIO REVISED CODE

2743.01 Definitions

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, it departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

• • •

2743.02 Waiver of state's immunity; claims reduced by collateral recovery

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award. or other collateral recovery by the claimant.

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TITLE 33: EDUCATION – LIBRARIES

§ 3301.07 Powers of state board.

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The state board of education shall exercise under the acts of the legislature general supervision of the system of public education in the state of Ohio. In addition to the powers otherwise imposed on the state board under the provisions of law, such board shall have the following powers:

(A) It shall exercise policy forming, planning and evaluative functions for the public school of the state, and for adult education, except as otherwise provided by law.

(B) It shall exercise leadership in the improvement of public education in Ohio, and shall administer the educational policies of this state relating to public schools, and relating to instruction and instructional material, building and equipment, transportation of pupils, administrative responsibilities of school officials and personnel, finance and organization of school districts and territory. Consultative and advisory services in such matters shall be provided by the board to school districts of this state.

(C) It shall administer and supervise the allocation and distribution of all state and federal funds for public school education under the provisions of law, and may prescribe such systems of accounting as are necessary and proper to this function. It may require county auditors and treasurers, boards of education, clerks of such boards, teachers, and other school officers and employees, or other public officers or employees, to file with it such reports as it may prescribe relating to such funds, or to the management and condition of such funds.

(D) It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community; the certification of teachers, administrators and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirements for graduation; and such other factors as the board finds necessary.

In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said schools, provided they do not conflict with provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.

(E) It shall formulate and prescribe minimum standards for driver education courses conducted at high schools in the state. In the formulation of standards for driver education courses, it shall call upon the director of highway safety for advice and assistance.

(F) It shall prepare and submit annually to the governor and members of the general assembly a report on the status, needs and major problems of the public schools of the state of Ohio, with recommendations for necessary legislative action.

(G) It shall prepare and submit to the director of budget and management the biennial budgetary requests of the state board of education, for its agencies and for the public schools of the state.

(H) It shall cooperate with federal, state and local agencies concerned with the health and welfare of children and youth of the state of Ohio.

(I) It shall require such reports from school districts, school officers, and employees as are necessary and desirable. The superintendent and clerk of a school district shall certify as to the accuracy of all reports required by law or state board or state department of education regulations to be submitted by the district and which contain information necessary for calculation of state funding. Any superintendent who knowingly falsifies such report shall be subject to certificate revocation pursuant to section 3319.31 of the Revised Code. The state board of education shall adopt rules and regulations governing the purchasing and leasing of data processing services and equipment for all local, exempted village, city, county, and joint vocational school district.

(J) It may adopt such rules and regulations as are necessary for the carrying out of any function imposed on it by

law, and may provide such regulations as are necessary for its government and the government of its employees, and may delegate to the superintendent of public instruction the management and administration of any function imposed on it by law.

(K) It may provide for the appointment of board members to serve on temporary committees established by the board for such purposes as are necessary. Permanent or standing committees shall not be created.

* * *

3313.17 (4834). Corporate powers of the board.

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

* * *

§ 3313.20 Rules and regulations; employee attendance at professional meetings, expenses.

The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. Rules and regulations regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. Any employee may receive compensa-

tion and expenses for days on which he is excused, in accordance with the policy statement of the board, by the superintendent of such board or by a responsible administrative official designated by the superintendent for the purpose of attending professional meetings as defined by the board policy, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred by an employee shall be paid by the board from the appropriate fund of the school district or the county board fund provided that statements of expenses are furnished in accordance with the policy statement of the board.

Each city, local, and exempted village school district shall adopt a written policy governing the attendance of employees at professional meetings.

* * *

3313.203 Liability insurance for board of education members

The board of education of any school district may purchase from an insurance company licensed to do business in this state, a policy or policies of insurance insuring members of boards of education against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity as a member of the board of education or resulting solely out of his membership thereon. Whenever the board considers it necessary to procure such insurance, it shall adopt a resolution setting forth the amount of the insurance to be purchased, the necessity thereof, and a statement of the estimated premium as quoted in writing by not less than two insurance companies if more than one company offers such insurance for sale to the board. Upon the adoption of such resolution, the board

may purchase insurance frm the insurance company submitting the lowest and best quotation. The premiums for such insurance shall be paid out of the general fund.

* * *

[CONTROL OF SCHOOLS; SPECIAL SCHOOLS]

§ 3313.47 Management and control of schools vested in board of education. (GC § 4836)

Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.

* * *

3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of

its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent reemployment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed reemployed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed reemployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or

before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed reemployed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic reemployment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed reemployed under either a limited or continuing contract as the case may be under the provisions of this section. (129 v 1206. Eff. 10-17-61. 128 v 123)

§ 5705.02 "Ten-mill limitation." (GC § 5625-2)

The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for

taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the "ten-mill limitation," and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

§ 5705.03 Authorization to levy taxes; collection. (GC § 5625-3)

The taxing authority of each subdivision may levy taxes annually, subject to the limitations of sections 5705.01 to 5705.47, inclusive, of the Revised Code, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations of such sections, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules, and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be deposited in its treasury to the credit of the appropriate fund.

§ 5705.192 Resolution relative to tax levy in excess of ten-mill limitation for school purposes.

The board of education of a city, exempted village, or local school district at any time in any year, by vote of

two-thirds of all members of said board, may declare by resolution and certify such resolution to the board of elections not less than sixty days before the election upon which it will be voted, that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the school district and that it is necessary to levy a tax in excess of such limitation for the purpose of providing for current expenses of the school district.

Such resolution shall specify the amount of increase in rate which it is necessary to levy, the portion of the increase in rate, if any, proposed to be levied in order to qualify for the distribution of school funds pursuant to the provisions of Chapter 3317, of the Revised Code, and the portion of the increased rate, if any, in excess of the amount necessary to qualify for the distribution of funds pursuant to the provisions of Chapter 3317. of the Revised Code, and whether or not there shall be a levy upon the duplicate of the current year. Such resolution shall not include a levy on the current tax list and duplicate unless such election is to be held at or prior to the first Tuesday after the first Monday in November of the current tax year.

The board of education, in such resolution shall specify that the total increased rate proposed to be levied, shall be for a continuing period of time, not withstanding the fact that the total millage for current expenses being currently levied by the district is at least the minimum millage rate required by section 3317.01 of the Revised Code. Such levies shall be in effect until such time as the rate may be decreased by an amount equal to or less than the amount of such voted increase, by a majority vote of the electors of the school district approving such decrease pursuant to the provisions of section 5705.261 [5705.26.1] of the Revised Code, or pursuant to the provisions of section 5705.31, 5705.331 [5705.33.1], or 5713.11 of the Revised Code; or such portion may be so decreased for a period of not to exceed one year, and from year to year, by a majority vote on the part of the board of education.

Such resolution shall go into immediate effect upon its passage and no publication of the same shall be necessary other than that provided for in the notice of election.

The powers granted to a board of education by this section are supplemental to and not in derogation of the powers otherwise granted to a board of education under Chapter 5705. of the Revised Code.

§ 5705.194 Resolution to submit emergency school levy.

The board of education of any school district may at any time declare by resolution that the revenue which will be raised by all tax levies which the district is authorized to impose, when combined with state and federal revenues, will be insufficient to provide for the emergency requirements of the school district or to prevent temporary or permanent closing of one or more schools within the district, and that it is therefore necessary to levy an additional tax in excess of the ten-mill limitation. Such resolution shall be confined to a single purpose and shall specify the purpose thereof, the amount of money it is necessary to raise for that purpose for each year the millage is to be imposed, and the number of years in which the millage is to be in effect, which may include a levy upon the current year's tax list. The number of years may be any number not exceeding five. The resolution shall specify the date of holding the election which shall not be earlier than sixty-five days after the adoption and certification of such resolution to the county auditor nor later than one hundred twenty days thereafter. A resolution adopted pursuant to this section may be submitted at a general election, a primary election, or a special election on the day specified in the resolution. A resolution adopted under this section shall not be submitted at more than one special election in any calendar year. Such resolution shall not include a levy on the current tax list and duplicate unless such election is to be held at or prior to the first Tuesday after the first

Monday in November of the current tax year. Said resolution shall go into immediate effect upon its passage and no publication of the same shall be necessary other than that provided for in the notice of election. A copy of such resolution shall immediately after its passing be certified to the county auditor of the proper county. Section 5705.195 [5705.19.5] of the Revised Code shall govern the arrangements for the submission of such question and other matters concerning such election. No special election shall be held during the ten days preceding or subsequent to Easter Sunday, Thansksgiving day, or Christmas day in any year. Publication of notice of such election shall be made in one or more newspapers of general circulation in the county once a week for three consecutive weeks. If a majority of the electors voting on the question so submitted in an election vote in favor of such levy, the board of education of the school district may forthwith make the additional levy necessary to raise the amount specified in the resolution for the purpose stated in the resolution. Such tax levy shall be included in the next annual tax budget that is certified to the county budget commission. After the approval of the levy and prior to the time when the first tax collection from such levy can be made, the board of education may anticipate a fraction of the proceeds of such levy and issue anticipation notes in an amount not exceeding the total estimated proceeds of the levy to be collected during the first year of the levy.

Such notes shall be sold as provided in section 133.01 to 133.65 of the Revised Code. If such anticipation notes are issued, they shall mature serially and in substantially equal amounts during each year over a period not to exceed five years; and if such notes are issued, the amount necessary to pay the interest and principal as they mature shall be deemed appropriated for such purposes from such levy, and appropriations from such levy by the board of education of the school district shall be limited each year to the balance available in excess of such amount.